

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Reese Telecommunications Inc.	)	File No. 0000310859
	)	
900 MHz Station WNKM 869	)	
Atlanta, Georgia	)	

**ORDER**

**Adopted: March 22, 2002****Released: March 25, 2002**

By the Chief, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau:

**I. Introduction**

1. This Order addresses a Request for Waiver filed by Reese Telecommunications Inc. (Reese) on December 13, 2000 (Waiver Request).<sup>1</sup> In the Waiver Request, Reese notifies the Commission of the temporary discontinuance of operations of its 900 MHz SMR station in Atlanta, GA (Station) in excess of 90 days, but asserts that it did not permanently discontinue operation of the Station, which would trigger cancellation of the license under Section 90.631(f) of the Commission's rules.<sup>2</sup> In the event the Bureau determines that the discontinuance of operations was permanent within the meaning of the rule, Reese requests a waiver of Section 90.631(f). For the reasons discussed below, we find that the circumstances presented by Reese do not constitute permanent discontinuance of operations within the meaning of Section 90.631(f), and we therefore dismiss Reese's Waiver Request as moot.

**II. Background**

2. Reese has held the authorization for the Station, licensed under call sign WNKM869, since 1995. During that time, Motorola, Inc. (Motorola) provided management services for the Station pursuant to a management agreement with Reese. On April 11, 2000, Reese notified Motorola that Reese was to be acquired by Southern Communication Services, Inc. (Southern). In June 2000, the parties filed a transfer of control application with the Commission for approval of Southern's acquisition of control of Reese. On July 7, 2000, Motorola cleared the channels and terminated operation of the Station. Motorola states that this was in accordance with its general practice as a manager when a Motorola-managed station was to be assigned from one licensee to another.<sup>3</sup> However, because the Reese-Southern transaction was

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<sup>1</sup> Reese Telecommunications, Inc. Request for Waiver filed December 13, 2000. Reese filed a Supplemental Memorandum in support of the Waiver Request on October 4, 2001 (Memorandum).

<sup>2</sup> 47 C.F.R. § 90.631(f).

<sup>3</sup> See Affidavit of Ronald W. Barkby, Manager of Regulatory Affairs-3G Spectrum for Motorola, Inc., at 2 (October 12, 2001) (Barkby Affidavit).

a corporate acquisition of Reese, not a license assignment, the parties to the transaction did not intend any cessation or interruption of the Station's operation, and Reese had not instructed Motorola to take any such action.<sup>4</sup> In mid-July of 2000, Motorola informed Reese that it had terminated operation of the Station. Reese states that it immediately instructed Motorola to recommence operation of the Station, but that Motorola failed to comply with this instruction.<sup>5</sup>

3. On August 15, 2000, the Commission approved the transfer of control from Reese to Southern. The transaction was consummated on September 29, 2000, and a Notice of Consummation was filed with the Commission on October 13, 2000. In mid-November 2000, Reese was advised that Motorola had failed to recommence operation of the Station as previously requested and again instructed Motorola to do so.<sup>6</sup> After ordering and installing the necessary equipment, Motorola recommenced operation of the Station on December 13, 2000. On the same day, Reese filed the instant notification of discontinuance and waiver request with the Bureau.

### III. Discussion

4. Section 90.631(f) provides that an "SMR licensee with facilities that have discontinued operations for more than 90 days is presumed to have permanently discontinued operations, unless the licensee notifies the Commission otherwise...prior to the end of the 90 day period."<sup>7</sup> In its Waiver Request and Memorandum, Reese acknowledges that as a result of Motorola's actions, the Station was non-operational from July 7 to December 13, 2000, a period of 159 days. However, Reese contends that the circumstances presented here do not constitute permanent discontinuance within the meaning of the rule. Reese contends that rule's use of the term "presumed" indicates that a discontinuance of more than 90 days does not automatically constitute permanent discontinuance, but merely creates a presumption of permanent discontinuance that may be overcome by a sufficient factual showing.<sup>8</sup> Reese argues that the presumption does not apply here in light of the facts surrounding the case, including the fact that Motorola's termination of operations was unauthorized by Reese and that Reese took steps to ensure that service was promptly reinstated.<sup>9</sup>

5. In the event the Bureau determines that the discontinuance of the Station's operations in excess of 90 days was permanent within the meaning of Section 90.631(f), Reese alternatively requests a waiver of the rule to prevent cancellation of the license. Reese argues that denial of the waiver would frustrate the underlying purpose of Section 90.631(f), which is to facilitate efficient spectrum use by recovering unused spectrum following permanent abandonment by an existing licensee.<sup>10</sup> Reese states

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<sup>4</sup> See Affidavit of James J. Morrison, Secretary of Reese Telecommunications, at 2 (October 25, 2001) (Morrison Affidavit); See also Barkby Affidavit.

<sup>5</sup> See Morrison Affidavit.

<sup>6</sup> See Barkby Affidavit.

<sup>7</sup> 47 C.F.R. § 90.631(f).

<sup>8</sup> We note that a substantial period of non-operation of an authorized facility without licensee knowledge will be considered as a factor in determining whether a *de facto* transfer of control of the station license has occurred.

<sup>9</sup> Memorandum at 2.

<sup>10</sup> Memorandum at 4.

that if its license is cancelled, the result will not be recovery of abandoned spectrum but rather interruption of service to the public. Reese also argues that grant of a waiver will serve the public interest by allowing Reese to continue to serve its existing customers and compete with other mobile radio service providers.<sup>11</sup>

6. Based on our review of the record, we conclude that under the particular facts and circumstances of this case, the cessation of the Station's operations from July to December 2000 did not constitute permanent discontinuance of operations within the meaning of Section 90.631(f). Although the rule provides that a discontinuance for more than 90 days is presumed to be permanent, Reese has submitted substantial evidence that the cessation of the Station's operations by Motorola was unauthorized by Reese,<sup>12</sup> and that Reese made prompt and diligent efforts in July and again in November 2000 to reinstate service upon being advised of Motorola's unauthorized actions.<sup>13</sup> Moreover, the total period of discontinuance – slightly over five months – was not significantly longer than 90 days, and Reese voluntarily notified the Commission of the fact the discontinuance had occurred. We find that these facts and circumstances are sufficient to overcome the presumption that Reese permanently discontinued operation of the Station. We emphasize that our decision is strictly limited to the facts presented herein, and that different circumstances, such as a lengthier period of discontinuance or a lack of diligence by the licensee in remedying unauthorized cessation of operations, could lead to a different result. Further, this decision in no way relieves licensees of responsibility for the acts or omissions of system managers resulting in violation of Commission rules.

7. For the reasons discussed above, we find that Reese did not permanently discontinue service in violation of Section 90.631(f). Because we conclude the rule does not apply in this instance, we dismiss Reese's request for waiver as moot.

#### IV. Ordering Clause

8. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 0.331, 1.925 and 90.631(f) of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.925, 90.631(f), the Waiver Request filed on December 13, 2000 by Reese Telecommunications Inc. IS DISMISSED as moot.

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<sup>11</sup> Memorandum at 4-5. Reese cites the 1995 *Page America* case as precedent for not canceling its license. Memorandum at 5-6. In that case, Page America acquired approximately 200 Part 22 paging authorizations by assignment, and discovered after consummation that many of the licensed facilities had either not been constructed or had been deconstructed and left non-operational for more than 90 days. The Wireless Bureau and Page America entered into a Consent Decree in which Page America agreed to the cancellation of licenses for 89 unconstructed facilities, but retained licenses for 26 stations that had been non-operational for more than 90 days, and made a voluntary payment of \$125,000 to the U.S. Treasury. PageAmerica of New York, Inc. and PageAmerica of California, Inc., Stations in the Public Mobile Service, *Order*, 10 FCC Rcd 8703 (WTB 1995).

<sup>12</sup> Motorola specifically acknowledges that its termination of operations was not authorized by Reese. *See* Barkby Affidavit.

<sup>13</sup> *See* Morrison Affidavit; Barkby Affidavit.

FEDERAL COMMUNICATIONS COMMISSION

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